

11 U.S.C. § 522
11 U.S.C. § 544
11 U.S.C. § 547
11 U.S.C. § 1303
11 U.S.C. § 1304

Scott v Elmlade, Ad. No. 690-6041
In re Scott, Case NO. 689-63914-H13

District Court NO. 91-6093

4/11/91 Judge Jones affirming PSH unpublishe
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Effectively overruling In re Fanning, Case No. 382-03722-H13, slip op. (Bankr. D. Or. June 28, 1982) (Hess, J.) And In re Kessler, Case No. 690-61397 (Bankr. D. Or. January 31, 1991) (Radcliffe, J.), the district court (Jones, J.) Affirmed an oral ruling of Judge Higdon holding that Chapter 13 debtors may not exercise a trustee's § 544 powers to avoid a creditor's unperfected security interest, valid between the debtor and creditor but not third parties, in order to bring a § 547 preference action. Chapter 13 debtors' powers are enumerated in § § 1302, 1304, and 522(f) and (h). If Congress intended to grant Chapter 13 debtors the trustee's avoidance powers under § 544, it would have expressly done so.

C. Tamb, Knapp
4-11-91
U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
APR 11 1991

DONALD M. CINNAMOND, CLERK
BY  DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:)	
)	
PETE P. SCOTT and)	Bankruptcy No. 689-63914-H13
DEBBIE D. SCOTT,)	
)	
Debtors.)	
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PETE P. SCOTT and)	Adversary No. 690-6041-H
DEBBIE D. SCOTT,)	
)	
Plaintiffs,)	Civil No. 91-6093
)	
v.)	<u>OPINION AND ORDER</u>
)	
JAMES ELMBLADE,)	
)	
Defendant.)	

JONES, Judge:

This action is an appeal from the United States Bankruptcy Court. Plaintiffs/debtors appeal the Bankruptcy Court's denial of their motion for summary judgment. The court has jurisdiction pursuant to 28 U.S.C. § 158(a).

Background

On December 1, 1988, plaintiffs purchased and took possession of a 1971 Tamarack mobile home. Plaintiffs pledged the mobile

home as collateral for the purchase price of the vehicle pursuant to a security agreement. Defendant/seller never perfected his security interest in the mobile home.

On November 21, 1989, plaintiffs filed for bankruptcy under Chapter 13 of the United States Bankruptcy Code. On February 27, 1990, plaintiffs filed an adversary proceeding to avoid defendant's lien on the mobile home pursuant to 11 U.S.C. § 547. The parties agree that, prior to the bankruptcy filing, defendant never made a demand to reclaim the mobile home or requested rescission of the sale. Stipulated Facts (Item #5). The parties also agree that transfer of the security interest to defendant would enable him to receive more than he would receive if this were a case under 11 U.S.C. Chapter 7, the transfer had not been made, and defendant received payment of his debt to the extent provided by Title 11. Stipulated Facts (Item #6).

The bankruptcy court did not issue a written opinion. In its judgment, the bankruptcy court denied plaintiffs' motion for summary judgment and granted defendant's motion for summary judgment. The bankruptcy court declared that defendant had a security interest in the mobile home, that defendant's security interest was not avoidable by plaintiffs, and that defendant could retain title to the mobile home. Plaintiffs appeal.¹

¹ In the bankruptcy proceeding, plaintiffs also claimed a homestead exemption on the mobile home under Or. Rev. Stat. 23.164(1). The bankruptcy court declared that plaintiffs' homestead exemption shall not apply to defendant's security interest in the mobile home. Plaintiffs do not appeal this part of the bankruptcy court's judgment.

Standard of Review

The court will not set aside findings of fact of the bankruptcy court unless clearly erroneous. In re Ott, 69 B.R. 1, 2 (D. Or. 1986). The court reviews conclusions of law de novo. Id.

Discussion

Plaintiffs/appellants are Chapter 13 debtors. The parties have stipulated facts which meet all the requirements of voiding a preferential lien pursuant to 11 U.S.C. § 547. Only a trustee may exercise the avoidance powers under § 547. The issue before this court is whether a Chapter 13 debtor can assert the trustee's avoiding powers.

There is a split of authority over whether a Chapter 13 debtor can employ the avoidance powers of Chapter 5. See, e.g., In re Jardine, 120 B.R. 559 (Bankr. D. Idaho 1990); In re Bruce, 96 B.R. 717 (Bankr. W.D. Tex. 1989); Matter of Mast, 79 B.R. 981 (Bankr. W.D. Mich. 1987) (holding in general that the debtor in Chapter 13 lacks standing to bring avoidance actions). But see, e.g., In re Weaver, 69 B.R. 554 (Bankr. W.D. Ky. 1987); Matter of Einoder, 55 B.R. 319 (Bankr. N.D. Ill. 1985); In re Boyette, 33 B.R. 10 (Bankr. N.D. Tex. 1983) (holding in general that the debtor can employ the avoidance powers).²

² Appellants cite to In re Sue S. Kessler, No. 690-61397-R13 (Bankr. D. Or. Jan. 31, 1991 (Radcliffe, J.) (order voiding lien). The court "announced its ruling at the hearing of November 21, 1990 that the Chapter 13 debtor has the voiding powers of a Chapter 7 trustee concerning transfers referred to in 11 U.S.C. § 547." Reply Brief of Appellants, Exhibit. Appellants also cite (continued...)

Under the Bankruptcy Code, 11 U.S.C. § 1303 and § 1304 specify the rights and powers that a Chapter 13 debtor may exercise exclusive of the Chapter 13 trustee. Section 1303 empowers the debtor to use, sell or lease property in accordance with parts of § 363 of the Code. Section 1304 grants additional powers to the debtor to enter into ordinary business transaction and to obtain credit. Neither section mentions the avoidance powers.

Pursuant to the legislative history of Section 1303, a Chapter 13 debtor holds other powers in addition to those enumerated in sections 1303 or 363, but those other powers are held concurrently with the trustee:

Section 1303 of the house amendment specifies the rights and powers that the debtor has exclusive of the trustee. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although Section 323 is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.

124 Cong. Rec. H11106 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

However,

There is no reference in either the Code or legislative history to other rights and powers that a Chapter 13 debtor may exercise without the cooperation of the trustee except in section 522(f) and Section 522(h), both of which specifically deal with the debtor's power to avoid liens and transfers of exempt property.

²(...continued)

to In re Fanning, No. 382-03722, slip op. (Bankr. D. Or. June 28, 1983) (Hess, J.) (court concluded Chapter 13 debtors may exercise the avoidance powers contained in § 544). Brief of Appellants, Exhibit.

In re Jardine, supra, 120 B.R. at 561.³

Those cases that hold the Chapter 13 debtor cannot exercise the Chapter 5 avoidance powers of the trustee note that "there does not exist any statutory authority for a Chapter 13 debtor to utilize avoidance powers granted to the trustee, including those powers listed in Sections 544, 545, 547, and 548 of the Bankruptcy Code." Matter of Mast, supra, 79 B.R. at 982. In contrast, "Chapter 11 and 12 debtors are granted all rights and powers of a trustee, subject to any limitations or conditions which the Court may prescribe." Id. at 982, n.3 (emphasis in original). See 11 U.S.C. §§ 1107(a), 1203.

These courts conclude that "[w]hen Congress desired a debtor to have rights and powers independent of those of the Chapter 13 trustee, it expressly provided those rights and powers." In re Jardine, supra, 120 B.R. at 561. In Chapter 13, "a debtor and trustee have clearly defined and distinct roles, as compared to Chapter 11 where there is normally no trustee, and the [Chapter 11] debtor is legislatively given a much broader responsibility on behalf of the estate and authorized to exercise many of the trustee's usual powers." Id. at 562. Therefore, "[i]f Congress intended to grant avoidance powers to a Chapter 13 debtor, it could have explicitly done so." Matter of Mast, supra, 79 B.R. at 982.

³ The weight of authority holds that sections 522(f) and 522(h) are available to Chapter 13 debtors. See In re Bruce, supra, 96 B.R. at 720; Matter of Einoder, supra, 55 B.R. at 324 n. 17.

On the other hand, those courts that find the Chapter 13 debtor can exercise the avoidance powers of trustee look to the fact that, in general, Chapters 1, 3, and 5 of the Bankruptcy Code apply to cases filed under Chapters 7, 11, 12, and 13. 11 U.S.C. § 103(a). These courts also point out that "the Chapter 13 debtor is not specifically barred from proceeding directly under § 547." Matter of Einoder, supra, 55 B.R. at 322.

In addition, these courts emphasize the unique nature of the trustee and debtor in Chapter 13 cases.

The essential role of a Chapter 13 trustee is to review plans, advise the Court with respect to plans and act as a disbursing agent under confirmed plans. The Chapter 13 trustee is not in a position to litigate actions under avoiding powers. ... the Chapter 13 trustee has no economic interest in pursuing such litigation.

Id. at 323. Because the Chapter 13 debtor plays the primary role in effecting a rehabilitation and the trustee is usually restricted to administrative matters, the courts find that the debtor should be able to exercise the trustee's avoidance powers. See In re Fanning, supra, slip op. at 5. See also Matter of Einoder, supra, at 322, 323 (a court should not be "blind to the realities of bankruptcy practice" and thus it is "only reasonable that the bankruptcy court allow the debtor to exercise the avoiding powers for his or her own benefit and for the creditors' indirect benefit as the trustees are unlikely ever to pursue those matters on their own").

Finally, relying upon the legislative history that 11 U.S.C. § 1303 "does not imply that the debtor does not also possess other

powers concurrently with the trustee," some courts have found a sharing of the trustee's avoidance power with the debtor:

The debtor in Chapter 13 is not the same as a Chapter 11 debtor-in-possession. There is always a trustee in a Chapter 13 case as contrasted with the normal Chapter 11 case where there is no trustee. Thus, a Chapter 13 debtor, although remaining in possession of his or her assets does not have all of the powers of a trustee. The Chapter 13 trustee, for example, retains the exclusive power to investigate the debtor's financial affairs, presumably to be able to comment intelligently on the debtor's proposed plan. The most logical analysis is that the Chapter 13 trustee has some of the trustee's powers, i.e. those necessary to carry out the trustee's assigned functions ... while the remaining trustee's powers vest in the Chapter 13 debtor. The Chapter 13 trustee has no need to pursue any avoiding powers to carry out any duties assigned to the Chapter 13 trustee by the Code. ... Thus the debtors have standing under § 547.

Matter of Einoder, supra, 55 B.R. at 323-24 (emphasis in original) (citations omitted).

The court finds those decisions holding that a Chapter 13 debtor can employ the trustee's avoidance powers interpret "the legislative history too broadly and without reading it in conjunction with the express language" of Sections 1303, 522(f), and 522(h). In re Jardine, supra, 120 B.R. at 562. Those Code sections do not grant the debtor "unfettered avoidance powers." Id. As noted above, "[i]f Congress intended to grant avoidance powers to a Chapter 13 debtor, it could have explicitly done so." Matter of Mast, supra, 79 B.R. at 982.

The court thus finds those cases holding Chapter 13 debtors cannot exercise the trustee's avoidance powers more persuasive. The court agrees that "[a]s compelling, practical and intensely equitable as [the alternative] arguments might be, they are at

bottom well-meaning forays into judicial legislation. ... Legislative history, especially floor comments, may augment but may not amend the statute's straightforward language." In re Bruce, supra, 96 B.R. at 721.

As noted above, however, Chapter 13 debtors can exercise the avoidance powers of the trustee pursuant to §§ 522(f) and 522(h). These sections, however, are not available to these debtors.

Pursuant to § 522(f), the debtor has the right to avoid a judicial lien or a nonpossessory, nonpurchase-money security interest under certain conditions. In the case at bar, the parties have stipulated that the mobile home was pledged as collateral for the purchase price of the vehicle. Therefore, defendant's lien on the mobile home is a purchase money security interest, and as such, § 522(f) is inapplicable.

In addition, § 522(h) only applies to involuntary liens. 11 U.S.C. § 522(g)(1)(A); In re Bruce, supra, 96 B.R. at 722. It is undisputed that defendant's lien is consensual. Hence, the debtors cannot avoid defendant's lien pursuant to § 522(h). It is also undisputed that defendant's lien is unperfected. However, "[w]hile the failure to perfect a lien may render such lien subordinate to the rights of third parties, as between the Debtor and creditor, the security interest is valid and the Debtor is estopped from denying its validity." Matter of Petsch, 82 B.R. 605, 607 (Bankr. M.D. Fla. 1988).

Appellants contend that if Chapter 13 debtors do not have the voiding powers of a Chapter 7 trustee, there would be no method


to void defendant's lien. Consequently, appellants argue that defendant would have a secured claim in a Chapter 13 case while having an unsecured claim in a Chapter 7 case. Reply Brief of Appellants at 4.

The court does not reach the question of whether the Chapter 13 trustee could exercise the avoiding powers if the trustee chooses to do so. However, the court notes that courts have "little doubt that the Chapter 13 trustee could exercise the avoiding powers." Matter of Einoder, supra, 55 B.R. at 324. Furthermore, "[a]s a matter of practice, a Chapter 13 debtor may easily request that the Chapter 13 trustee utilize his powers to set aside avoidable transfers." Matter of Mast, supra, 79 B.R. at 982. In the alternative, "the Chapter 13 Plan may propose that the debtor, on behalf of the estate, and in conjunction with the trustee, utilize avoidance powers to assure equality of distribution and no unfair discrimination among creditors." Id. See also In re Walls, 17 B.R. 701, 704 (Bankr. S.D. W. Va. 1982). Appellants' contention that there would be no method to void defendant's lien is thus without merit.

Conclusion

Based upon the above, the court concludes that a Chapter 13 debtor does not have independent standing to exercise the trustee's power to avoid a preferential transfer pursuant to § 547 of the Bankruptcy Code. The judgment of the Bankruptcy Court is therefore AFFIRMED.

DATED this 10th day of April, 1991.



ROBERT E. JONES
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION

FILED
ENTERED
APR 11 1991

DONALD M. CINNAMOND, CLERK
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:)
KATHLEENE JEROLD MILLER,) Civil No. 91-6044-JO
Debtor.) Bankruptcy No. 689-62396-H13
JUDGMENT

The decision of the Bankruptcy Court is affirmed in part and reversed in part and remanded to the bankruptcy court.

DATED: April 11, 1991.

DONALD M. CINNAMOND, CLERK

by

Dan Marsh
Dan Marsh, Deputy Clerk

JUDGMENT

U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
ENTERED
APR 11 1991

DONALD M. CINNAMOND, CLERK
BY *SM* DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PETE P. SCOTT and DEBBIE D. SCOTT,)
)
Plaintiffs,) Civil No. 91-6093-JO
)
v.) JUDGMENT
)
JAMES ELMBLADE,)
)
Defendant.)

The judgment of the Bankruptcy Court is affirmed.

DATED: April 11, 1991.

DONALD M. CINNAMOND, CLERK
by *Dan Marsh*
Dan Marsh, Deputy Clerk

JUDGMENT

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